similar requirements.[213] First, under our leased access rules, cable operators must accommodate part-time programmers on only a small portion of their capacity.[214] By contrast, an open video system operator may be required to lease two-thirds of its capacity to part-time unaffiliated video programming providers. Second, in enacting cable leased access, Congress was addressing the cable operator's editorial control over virtually its entire system.[215] We believe that while the goals of the cable leased access requirements may be similar to those here, the methods to achieve those goals are different. Open video systems, through the one-third limitation on the open video system operator, are intended to attract multiple video programming providers, that can also accommodate the needs of part-time programmers.

87. In addition, however, open video system operators will not be permitted to require video programming providers to obtain capacity in increments of more than one channel. We also find that this restriction is just, reasonable, and not unjustly or unreasonably discriminatory under the statute because allowing an open video system operator to require video programming providers to obtain multiple channels, such as five-channel increments, would unfairly disadvantage smaller video programming providers which do not have sufficient programming to fill multiple channels. We think that such a condition of carriage would be unreasonable and would contravene the statute's non-discrimination prohibition.[216] As discussed more fully below, however, an open video system operator may establish reasonable levels of differentiation in carriage rates, such as volume discounts, provided that the bases for differentiation are not unjust or unreasonable.[217]

(ii) *Maximum Channel Allocations*

88. We conclude that open video system operators should be permitted to limit unaffiliated programming providers to selecting the programming for carriage on no more capacity than the amount obtained by the open video system operator or its affiliate. We therefore disagree with the argument of certain cable operators that, under Section 653(b)(1)(B), if the demand for carriage exceeds capacity with only a single unaffiliated video programming provider and the open video system operator requesting capacity, the unaffiliated programming provider would be entitled to two-thirds of the capacity while the open video system operator

[213]NCTA Comments at 16; American Cable, et al. Comments at 17-18; Michigan Cities Reply Comments at 12 (urging increments as short as 15 minutes).

[214]Communications Act §§ 612(b)(1)(D), 47 U.S.C. §§ 532(b)(1)(D) (a cable system of fewer than 36 channels is not required to designate channels for leased access); 612(b)(1)(A), 47 U.S.C. 532(b)(1)(A) (a cable system of 36-54 channels must designate 10% of the channels for leased access); 612(b)(1)(B)-(C), 47 U.S.C. 532(b)(1)(B)-(C) (a cable system of 55 or more channels must designate 15% of the channel for leased access).

[215]Communications Act §§ 612(a), 612(b)(1), 47 U.S.C. §§ 532(a), 532(b)(1).

[216]Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A).

[217]*See infra* Section III.D.2.

would be restricted to one-third.[218] First, we believe that Section 653(b)(1)(B) contemplates the presence of robust demand for channel capacity by multiple video programming providers, such that the system capacity would not be dominated by a single programming provider. Moreover, we believe that such a result would discourage the deployment of open video systems by permitting an unaffiliated video programming provider to dominate the selection of programming on the system. Given that the financial risk of constructing the open video system rests primarily on the open video system operator, we do not believe that Section 653(b)(1)(B) requires that the open video system operator entrust the success or failure of its system to an entity with limited risk in building the infrastructure.[219]

89. For the above reasons, we find that a term or condition of carriage limiting unaffiliated programming providers to selecting the programming on no more of the capacity than the open video system operator or its affiliate would not violate the Commission's rules, and would be just, reasonable, and not unjustly or unreasonably discriminatory under Section 653(b)(1)(A).[220]

90. We also disagree with Adelphia/Suburban Cable that Section 653(b)(1)(B)'s one-third limit is actually a maximum rather than a minimum, and that the statute does not require the Commission to allow an open video system operator and its affiliates to occupy one-third of the channel capacity in all cases. For instance, assume a 100-channel system on which the open video system operator itself seeks as much capacity as possible, and four unaffiliated video programming providers each seek 25 channels. Under this scenario, Adelphia/Suburban Cable argues that all five programmers should receive 20 channels, rather than allowing the system operator to obtain one-third of the system's capacity (33 channels) while requiring that the four unaffiliated video programming providers divide the remaining two-thirds of capacity (67 channels), as will occur under our interpretation of Section 653(b)(1)(B). Adelphia/Suburban Cable contends that absent this interpretation, the system operator will have no incentive to construct additional capacity to meet demand.[221] We find that nothing in the plain language of Section 653(b)(1)(B) or its legislative history supports Adelphia/Suburban Cable's interpretation. We believe that Adelphia/Suburban's approach would contravene the statute's intent that an open video system operator and its affiliates be afforded one-third of the system's capacity when carriage demand exceeds the system's capacity. We believe that Adelphia/Suburban Cable's

[218]American Cable, et al. Comments at 17-18; Cablevision Systems/CCTA Comments at 10-11; TCI Comments at 12; NCTA Comments at 14-15; Adelphia/Suburban Cable Reply Comments at 4.

[219]*See* U S West Comments at 14 (stating that a local exchange carrier will have little incentive to invest in the construction of an open video system for the dominant use of an unaffiliated video programming provider); Telephone Joint Commenters Reply Comments at 5-6; National League of Cities, et al. Comments at 14-15; NYNEX Comments at 8.

[220]Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A). *See infra* Section III.D.

[221]Adelphia/Suburban Cable Reply Comments at 3-4

method would unduly restrict an open video system operator's ability to compete, and undermine Congressional intent by discouraging the deployment of open video systems.

(5) Subsequent Changes in Capacity or Carriage Demand

(a) *Notice*

91. In the *Notice*, we sought comment on how additional capacity that becomes available on an open video system after the initial allocation should be distributed. We also sought comment on what rules should apply when initial demand for carriage does not exceed system capacity, but subsequent demand triggers Section 653(b)(1)(B)'s one-third limit. In this context, we sought comment on whether it would be permissible for an open video system operator to hold periodic enrollment periods during which capacity would be reallocated, rather than requiring such reallocation immediately.[222]

(b) *Discussion*

92. To ensure that open video systems remain open after the initial allocation of channel capacity, we will require an open video system operator to allocate open capacity, if any is available, at least every three years, beginning three years from the date service commenced.[223] By "open capacity" we mean channel capacity that has become available during the course of the year, whether due to a system upgrade, the expiration of video programming providers' carriage contracts, or for any other reason. Capacity held by the open video system operator or its affiliate above the one-third of the system's activated channel capacity will be considered "open capacity."[224] For example, if the demand for carriage did not exceed system capacity when capacity was initially allocated, and the open video system operator was able to select the programming on 50% of the system's activated channel capacity, the 17% of capacity on which the open video system operator is providing programming above the one-third limit (50% - 33%)

[222] *Notice* at paras. 25-27.

[223] *See* MFS Communications Comments at 20-21 (three years). U S West Comments at 12 (three years as an absolute minimum, five years as more reasonable).

[224] Viacom suggests that, when capacity becomes available on an open video system, the open video system operator should be required to make this new capacity available to unaffiliated providers "on a reasonable basis," such as by limiting the affiliated provider "to no more than one-third of any new capacity if oversubscription recurs" and allocating the remaining two-thirds of new capacity to unaffiliated video programming providers. Viacom Comments at 11-12. We reject this approach, however, because, if carriage demand exceeded system capacity when capacity was initially allocated (or when open capacity was previously allocated) and the affiliated video programming provider obtained its maximum permitted one-third of system capacity, it would allow the open video system operator to select the programming on more than one-third of the system's capacity even though carriage demand to exceed capacity. Such an approach thus may contravene Section 653(b)(1)(B) of the statute.

will be considered "open capacity" for purposes of the allocation process.[225]

93. We note that capacity on an open video system may become available due to the efficiencies of channel sharing, under which a video programming service to be offered by multiple video programming providers is placed on a single channel and shared by the multiple providers. We believe that all existing video programming providers should share in the efficiencies of channel sharing. Thus, additional capacity resulting from channel sharing will not count as "open" capacity and should be allocated through an open, fair, non-discriminatory process among existing video programming providers as soon as practicable after channel sharing is implemented.[226]

94. In order to assess the demand for additional capacity, we will require open video system operators to maintain a list of *bona fide* video programming providers that have requested carriage or additional capacity during the previous three year period. Information regarding how a video programming provider should apply for carriage and the closing date for that three year period's allocation must be made available to potential video programming providers upon request. An operator should establish a closing date by which video programming providers may seek to lease additional capacity that reasonably relates to the time when programming services to be carried on the additional capacity will first be provided to subscribers. The open video system operator need not file a new Notice of Intent with the Commission, nor otherwise solicit additional demand, after the initial allocation of capacity has been completed. An open video system operator will not be required to follow these rules if there is no open capacity to be allocated.

95. Once the open video system operator has determined that additional capacity is available and has assessed carriage demand, it must allocate the open capacity at least once every three years through an open, fair, non-discriminatory process. Consideration should be given to all video programming providers that properly apply for carriage prior to the closing date in that three year period's allocation of open capacity. Additional must-carry obligations must be accommodated in accordance with our open video system must-carry rules.[227] Additional PEG access obligations must be accommodated in accordance with the regulations adopted in this Order.[228] In the absence of additional PEG access obligations, the open video system operator may use any capacity that becomes available during the remainder of the current three year

[225]Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

[226]As discussed above, shared channels will count against the one-third limit on capacity for which an open video system operator may select the programming, when demand exceeds system capacity, on a pro-rata basis to the extent that the affiliated video programming provider is one of the providers carrying the shared programming service. *See infra* Section III.C.1.e(2).

[227]*See* 47 C.F.R. § 76.1506.

[228]*See infra* Section III.E.1.

allocation cycle.

96. After careful consideration of the record, we decline to require periodic enrollment periods at which time the total channel capacity of an open video system would be subject to re-allocation.[229] That is, so long as an unaffiliated video programming provider continues to meet the conditions of carriage, it may continue to use its initially allocated capacity until its carriage contract expires, instead of facing the potential of periodic displacement.[230] We believe that this approach will provide stability, certainty and flexibility to the platform. For subscribers, this approach will mean less confusion and less disruption of their channel line-ups; for video programming providers, this approach will provide additional incentive and ability to invest in and market their services; and for open video system operators, this approach will provide the flexibility to negotiate the length of carriage arrangements based on their business judgment and offer a more stable product to consumers. While we acknowledge the National League of Cities, et al.'s concern that an open video system operator could limit subsequent access to the system by negotiating for long-term carriage contracts, we believe that, as of now, the above benefits outweigh the speculative harm.[231] If it becomes apparent that long-term contracts are being used in a discriminatory or anti-competitive manner, we may re-examine our conclusion.

97. We reject suggestions that an open video system operator should have to re-allocate open capacity in response to subsequent carriage requests in less than three years.[232] An open video system operator must be able to accommodate subsequent demand without causing unreasonable disruption to the system and confusion for subscribers.[233] Specifically, we reject the approach suggested by National League of Cities, et al., that would require a system operator or its affiliates to relinquish capacity within 30-60 days of a request for demand until the two-thirds of system capacity allocable to unaffiliated programming providers is completely occupied.

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[229]In light of our finding concerning a rolling, three year allocation cycle, we do not reach commenters' suggestions that the interval between periodic enrollment periods, if such enrollment periods were required, should be longer than three years. *See* HBO Comments at 7-8 (five years); NYNEX Comments at 8-9 (five years, subject to programming contracts).

[230]This approach is consistent with certain commenters' argument that a video programming provider should not have to relinquish capacity after activation of the system because this could require abrogating programming contracts. Viacom Comments at 11-12; USTA Comments at 18; Telephone Joint Commenters Comments at 21.

[231]*See* National League of Cities, et al. Reply Comments at 25-26.

[232]National League of Cities, et al. Comments at 23 (30-60 days); Adelphia/Suburban Cable Reply Comments at 7 (urging a period of 90 days, given a cable operator's duty to discontinue carriage of programming to make room for a new must-carry television broadcast station within this time frame); NCTA Comments at 16 (stating that a system operator should be required to allocated capacity above the one-third limit, or add capacity to meet additional demand, within one year); Alliance for Community Media, et al. Comments at 28-29 (same).

[233]*See generally*, Telephone Joint Commenters Comments at 21; MFS Communications Comments at 23; Viacom Comments at 12.

According to National League of Cities, et al., this approach would preserve access to open video systems and would help prevent channels from going unused or being "locked up" by affiliated video programming providers.[234] We disagree. Requiring the affiliated video programming provider to relinquish capacity within 30-60 days of receiving additional requests for carriage unduly compromises the stability of the affiliated provider's programming package, and would undermine its ability to market its offerings.

(6) Channel Positioning

(a) *Notice*

98. In the *Notice*, we sought comment on whether the channel positions to which video programming providers' program services are assigned should be subject to Section 653(b)(1)(A)'s non-discrimination requirements. In this regard, we asked whether it would violate Section 653 for an open video system operator to reserve the lower numbered channels for itself or its affiliates, since these channels may be considered more valuable to the extent they are more accessible to consumers. We further asked for information on any technology, such as "channel mapping," that could resolve any perceived problems in this area.[235]

(b) *Discussion*

99. Channel positioning is an important part of allocating channel capacity to video programming providers, and therefore we will require an open video system operator to assign channel positions in a manner that is not unjustly or unreasonably discriminatory.[236] Certain channels, such as the lower-numbered channels, may be considered more valuable because they may be more accessible to consumers who scroll through the channels in sequence. In determining whether an open video system operator has assigned channel positions in a non-discriminatory manner, we will weigh whether the operator has implemented any technology that substantially alleviates concerns in this area, such as channel mapping, as well as the process employed by the operator to allocate channel numbers.[237] We also find that, given Section

[234]National League of Cities, et al. Comments at 23-24

[235]*Notice* at para. 22.

[236]*See, e.g.*, American Cable, et al. Comments at 19-20; ABC Comments at 20; Community Broadcasters Assoc. Comments at 3-4; State of California Comments at 8; NCTA Comments at 11; National League of Cities, et al. Comments at 15; Telephone Joint Commenters Comments at 20

[237]Channel numbers are normally associated with specific frequencies used to transmit video programming. Channel mapping alters this relationship by displaying on specialized equipment, usually a set-top box, a different channel number than the number normally associated with the frequencies used to deliver the programming. For example, channel mapping set-tops can display to the subscriber channel number 2, which is usually associated with the video frequency 51.25 MHz, while the video programming being shown is actually transmitted on the frequency 83.25 MHz, which is the frequency usually associated with channel number 6.

653(b)(1)(A)'s specific exemption of must-carry and PEG from its general non-discrimination requirements,[238] an open video system operator must comply with the channel positioning requirements contained in those rules.[239]

g. Channel Sharing

(1) Notice

100. New Section 653(b)(1)(C) of the Communications Act requires that the Commission's regulations permit an open video system operator "to carry on only one channel any video programming service that is offered by more than one video programming provider, including the local exchange carrier's video programming affiliate, provided that subscribers have ready and immediate access to any such video programming service."[240] The Conference Report states that this provision was intended "to permit an open video system operator to require channel sharing."[241]

101. We tentatively concluded in the *Notice* that open video system operators should be permitted to choose how and which programming will be carried on shared channels, and sought comment on this conclusion.[242] Further, we sought comment on whether the Commission should prescribe any terms under which channels may be shared, and in particular, whether channel sharing is subject to the 1996 Act's non-discrimination requirements. In this regard, we sought information on any differences that may exist between shared and non-shared channels that might make non-shared channels more attractive to video programming providers.[243] We also sought comment on the meaning of the phrase "ready and immediate access" as used in the statutory provision, such as whether channel sharing must be "transparent" to consumers.[244] Finally, we tentatively concluded that the rights of programming vendors and licensors should be preserved by requiring each video programming provider seeking to offer programming carried on a shared channel to first obtain separate permission from the program service.[245]

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[238]Communications Act § 653(c)(1)(B), 47 U.S.C. § 573(c)(1)(B).

[239]NBC Comments at 5, 10-11; Fujitsu Ex Parte Comments at 3; ABC Comments at 5 (noting the Commission's past recognition of the importance of channel positioning to broadcasters, 47 C.F.R. §§ 76.56(d), 76.57(a)).

[240]Communications Act § 653(b)(1)(C), 47 U.S.C. § 573(b)(1)(C).

[241]Conference Report at 177

[242]*Notice* at paras. 36-37

[243]*Id.* at para. 39

[244]*Id.* at para. 40.

[245]*Id.* at para. 41.

(2) Discussion

102. As an initial matter, we believe that the statute permits an open video system operator to decide whether to create shared channels for some or all of the duplicative programming on its system.[246] We therefore affirm our tentative conclusion that an open video system operator may implement and administer the channel sharing process.[247] We disagree with NCTA's argument that a system operator should be required to employ an independent entity,[248] or to create a committee comprised of the video programming providers on the system,[249] in order to administer channel sharing. We believe that an operator of an open video system should have the flexibility to address technical and other factors that may affect channel sharing.[250]

103. The National League of Cities, et al. expresses concern that, if an open video system operator selects the programming placed on shared channels, in advance of video programming providers' decisions to carry such programming, the operator will be exercising editorial control over unaffiliated programming providers' offerings, and therefore will be engaging in impermissible discrimination.[251] Nothing in Section 653(b)(1)(C) allows an open video system operator to select which programming will be carried on shared channels prior to the existence of duplicative programming on the system. For the open video system operator to pre-determine the shared channels not only distorts the normal meaning of shared, but undermines the statutory intent that the system afford access to independent entities.[252] Section 653(b)(1)(C) permits a system operator to place on a single channel a programming service "that is offered by

[246]*See, e.g.*, American Cable, et al. Comments at 10-11 (stating that a system operator must be prevented from favoring any one video programming provider).

[247]*See* Telephone Joint Commenters Reply Comments at 13-14

[248]NCTA Comments at 10

[249]Rainbow Comments at 20-22; American Cable, et al. Comments at 10-11; Cablevision Systems/CCTA Comments at 14; MPAA Comments at 7. We therefore do not reach the arguments of certain parties that even the appointment of an independent entity by the system operator would provide no safe harbor for unaffiliated programmers because the influence of the system operator would still pervade. Group W Comments at 5; NCTA Comments at 10; National League of Cities, et al. Comments at 26

[250]Telephone Joint Commenters Comments at 24-25; NYNEX Comments at 15; U S West Comments at 14. We also believe that this approach addresses the concerns of Golden Orange Broadcasting, which contends that programming carried on shared channels will be more accessible to consumers, and that broadcasters therefore must have the right to insist on placement on a shared channel. As stated above, channel sharing may be subject to negotiations between video programming providers and programming vendors. Golden Orange Broadcasting Comments at 3-4.

[251]National League of Cities, et al. Comments at 26

[252]*See, e.g.*, Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

more than one video programming provider."[253] We clarify that channel sharing may be implemented by an open video system operator only after a determination is made regarding which programming services will be offered by more than one video programming provider.[254] We disagree with telephone companies that argue that the statutory reference to "*any* video programming service" means that an open video system operator may select -- in advance of any actual duplication -- which program services to place on shared channels.[255] We also note that certain cable operators and programmers argue that the placement of a programming service on a shared channel must be conditioned on the approval of the programming service.[256] We take this to mean simply that each video programming provider using the shared channel has reached its own agreement with the programming service. We reaffirm our statement in the *Notice* that nothing in our regulations concerning channel sharing should be construed to impair the rights of program services. Consistent with our rules governing competitive access to video programming,[257] a program vendor will still possess the right to negotiate over specific terms and conditions with each video programming provider. Once the programming service has reached agreements with all of the relevant video programming providers, however, we do not believe that additional consent is necessary for the open video system operator to place the programming service on a shared channel.

104. We find that the statutory provision requiring that subscribers have "ready and immediate" access to programming carried on shared channels means that channel sharing must be transparent to subscribers. This requires that subscribers be able to access programming carried on shared channels with no more difficulty than programming carried on non-shared channels. We do not believe this is unduly burdensome for open video system operators. Many cable operators currently provide different programming on the same channel in a manner transparent to subscribers receiving the respective signals. Moreover, we believe that, given this advance guidance that channel sharing must be transparent to consumers, open video system operators will be able to design and construct their systems to accommodate this requirement and avoid subsequent costs or disruption of the system. We thus reject telephone companies' assertions that we should merely codify the "ready and immediate" provision because the adoption

[253]NCTA Comments at 10. NCTA argues that this efficiency can just as easily be achieved without the system operator's direct involvement. *Id. But see* NAB Comments at 10 (asserting that, because channel sharing is largely a technical issue, the system operator is probably in the best position to administer it). In addition, as noted above, the statute leaves channel sharing to the open video system operator's discretion.

[254]National League of Cities, et al. Comments at 26

[255]Telephone Joint Commenters Reply Comments at 12

[256]MPAA Comments at 7; NCTA Comments at 10; Assn. of Local Television Stations Comments at 12; ABC Comments at 9; Group W Comments at 3; NAB Comments at 9; Viacom Comments at 15-16; HBO Comments at 23; ESPN Reply Comments at 4

[257]47 C.F.R. §§ 76.1000-1004

of any specific regulations might inhibit deployment of open video systems.[258]

h. Technical Issues

(1) Notice

105. In the *Notice*, we sought comment on whether certain technical requirements could restrict video programming providers' access to open video systems, and whether it would be necessary for the Commission to adopt any regulations or standards regarding technology to promote such access.[259]

(2) Discussion

106. We clarify that the availability of technology necessary to access an open video system operator is part of the overall process for allocating open video system channel capacity, and therefore subject to the statute's non-discrimination requirements. An operator may not discriminate among video programming providers with respect to technology or technical information necessary to access the system.[260] This would include all technology and equipment related to compression techniques, arranging the digital data for transport, and the "last-mile" physical transport of the signal to the customer's premises.[261] We believe that this approach will allow open video system operators to design technical standards in accordance with market forces rather than regulation,[262] while preserving fair access for unaffiliated video programming providers.

[258]Telephone Joint Commenters at 25; U S West Comments at 14 (stating that an open video system operator will have a natural incentive to comply with this requirement); NYNEX Comments at 15-16.

[259]*Notice* at para. 23.

[260]*See* Rainbow Comments at 18-19.

[261]NAB Comments at 4; Assn. of Local Television Stations Comments at 16 (stating that system characteristics should reflect maximum commonality with broadcast ATV digital technical characteristics).

[262]HBO Comments at 8-9. *See also* MFS Communications Comments at 7:

> There is no reason to suggest that Congress intended only one type of [open video system] platform for carriers to transmit video programming, and therefore effectively to limit video distribution infrastructure development only to the incumbent dominant local telephone and cable television carriers.

2. Open Video System Operator Co-Packaging of Video Programming Selected by Unaffiliated Video Programming Providers

a. Notice

107. In the *Notice*, we stated that new Section 653(b)(1)(B) of the Communications Act restricts the amount of capacity for which an open video system operator and its affiliates may select programming, where carriage demand exceeds system capacity; however, that section also provides that nothing therein should be construed to limit "the number of channels that the carrier and its affiliates may offer to provide directly to subscribers."[263] We tentatively concluded that this provision allows a system operator and its affiliates to enter into agreements to co-package to subscribers the programming services selected for carriage by unaffiliated video programming providers, and sought comment on this conclusion.[264] Co-packaging would permit one video programming provider to package its services with those of another video programming provider, and market the combined offerings to consumers as one package of video programming.

b. Discussion

108. We affirm our tentative conclusion that Section 653(b)(1)(B) permits an open video system operator to enter into agreements to co-package the video programming selected by other video programming providers with the operator's selected programming, and market the combined offerings as one package to subscribers.[265] We also note that video programming providers that are not affiliated with the open video system operator are free to enter into co-packaging arrangements with each other.[266] We believe that this approach can provide efficiencies to independent programmers that may find it difficult to market their service to consumers on an individual basis. We also believe that consumers may benefit from having multiple options for subscribing to program services.[267]

109. We further believe that co-packaging may not be imposed by an open video system operator as a condition of carriage on an open video system, such that an open video system operator could refuse access to a video programming provider that is unwilling to subject its video programming to co-packaging. Such a condition would allow an open video system operator to exercise editorial control over the two-thirds of capacity allocable to unaffiliated video

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[263] *Notice* at para. 27 (*citing* Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B)).

[264] *Id.*

[265] *See* Telephone Joint Commenters Comments at 21; HBO Comments at 6; NYNEX Comments at 14; State of New York Comments at 10; USTA Comments at 18

[266] CATA Comments at 4; Continental Comments at 12

[267] Viacom Comments at 12-13

programming providers (when carriage demand exceeds system capacity). This would violate the statute's non-discrimination requirements by allowing the operator to limit the access of video programming providers not amenable to co-packaging arrangements.[268] We further note that Congress applied Section 616 of the Communications Act governing the regulation of carriage agreements to open video system operators.[269] Under this section, multichannel video programming providers, including open video system operators, may not: (1) require a financial interest in a program service as a condition of carriage; (2) coerce a video programming service to provide, or retaliate against such a service for failing to provide, exclusive rights against other MVPDs as a condition of carriage; or (3) engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming service to compete fairly by discriminating based on affiliation or non-affiliation in the selection of terms and conditions of carriage.[270] We believe that prohibiting an open video system operator from requiring co-packaging as a condition of carriage is consistent with Congress' intent in applying Section 616 on open video system operators.

110. Co-packaging arrangements therefore must be purely voluntary among the parties involved.[271] Differences in co-packaging arrangements would be permissible, however, so long as the open video system operator complies with the rules described below regarding the rates, terms and conditions of carriage.[272]

111. Only the National League of Cities, et al. object to the Commission's tentative conclusion that an affiliated programming provider may co-package programming selected by unaffiliated video programming providers. They argue that Section 653(b)(1)(B) merely clarifies that the one-third limit on the amount of capacity for which the system operator and its affiliates may select the programming is not absolute -- that is, if the operator builds additional capacity, then it may also select the programming for one-third of that additional capacity.[273] We do not believe, however, that Congress would have found it necessary to delineate specifically the fact that an open video system operator is allowed to select the programming on one-third of a system's capacity, regardless of the size of the system.

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[268]Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A).

[269]Communications Act § 616, 47 U.S.C. § 536

[270]*Id.*

[271]Access 2000 Comments at 4; Viacom Comments at 12-13

[272]Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

[273]National League of Cities, et al. Comments at n.7

D. Rates, Terms, and Conditions of Service

1. Just and Reasonable Carriage Rates

a. Notice

112. Section 653 (b)(1)(A) requires that rates for carriage on open video systems be just and reasonable and not unjustly or unreasonably discriminatory. This provision reflects the goal of affording unaffiliated video programming providers access to, and fair treatment on, open video systems, while at the same time preserving for operators the viability of open video systems through the ability to realize a return on the economic value of their investment.

113. In the *Notice*, we sought comment on how to ensure that open video system carriage rates are just and reasonable and not unjustly or unreasonably discriminatory, as required by Section 653(b)(1)(A). We asked whether market incentives and the presence of existing competitors will ensure such carriage rates or whether a specific regulatory framework or pricing formula is necessary. We also asked for comment on a "safe harbor" approach, e.g., rates will be presumed reasonable if a certain number of unaffiliated programmers are willing to pay existing rates on a certain percentage of available capacity, and whether an open video system operator should be required to charge rates to unaffiliated programmers that are no greater than the rates it charges itself or its affiliates for carriage.[274]

b. Discussion

114. Our intent is to provide maximum flexibility to open video system operators to respond to market forces consistent with the statutory obligation that carriage rates are just and reasonable and not unjustly or unreasonably discriminatory. We believe that primary reliance on a "presumption" approach best achieves these goals. We will accord a strong presumption that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where the rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator. Where these conditions are met, the complainant will have the burden of demonstrating that the rate is not just and reasonable. Where these conditions are not met, and a potential video programming provider files a complaint with the Commission, the open video system operator will bear the burden of demonstrating that the contested carriage rate is no greater than a carriage rate that could be imputed to the operator's affiliated video programming. We will require the operator to show that it charges the unaffiliated programmer no more for carriage than it earns from carrying its own affiliates' programming. As noted in Section III.C.1.f.(3), analog and digital channel capacity will be treated separately for this purpose

[274] *Notice* at paras. 29-31.

115. Commenters suggest several rate regulation approaches. LEC interests generally oppose the establishment of a specific regulatory scheme for open video system carriage rates.[275] They assert that since open video system operators will be new entrants with no market power, market forces will ensure that their carriage rates are just and reasonable.[276] These LECs propose that open video system carriage rates be unregulated except for the adjudication of complaints. The Telephone Joint Commenters argue that: (1) telephone companies entering a particular market will almost always face competition from an incumbent cable operator, (2) such competition constitutes "effective competition" under Title VI of the Communications Act, and therefore (3) the Commission should presume that open video system rates for wholesale video transport are "just and reasonable," just as cable rates are deemed just and reasonable under the "effective competition" test.[277] Some telephone companies suggest that where the market will not constrain rates, aggrieved parties will always be able to complain, and that the Commission will then be able to regulate on a case-by-case basis.[278] The Telephone Joint Commenters also maintain that no rate formula is possible, and that ensuring a just and reasonable rate should be accomplished through a complaint process. They assert that there can be no formula to evaluate the reasonableness of a rate.[279]

116. MCI and others respond that the LEC commenters are focusing on the wrong market. Simply because effective competition exists in the video distribution market, which is why open video system rates to subscribers are not regulated, does not mean competition exists in the video carriage market.[280] These parties argue that an open video system operator's incentives in these two markets are completely reversed whereas the operator will compete on price in order to attract as many subscribers as possible in the distribution market, it will attempt to exclude as many unaffiliated programming providers as possible in order to exert greater control over the open video service platform in the carriage market. MCI further argues that,

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[275]*See, e.g.*, U S West Comments at 4-6; USTA Comments at i, 8-10, and 13-16; USTA Reply Comments at 7; NYNEX Comments at 5, 23; MFS Communications Comments at 10-13; Telephone Joint Commenters Comments at 3-4

[276]*See*, U S West Comments at 5-6. U S West argues that no rate regulation should be imposed but if it is, the presumption of reasonableness should be tied to retail prices, not to costs. *See also* NYNEX at 23-24; USTA Comments at 14-15; Telephone Joint Commenters Reply Comments at 16-17.

[277]*See Ex Parte* Affidavit of Thomas W. Hazlett, filed April 17, 1996 at 3-4.

[278]USTA Comments at 11; NYNEX Comments at 23; NTCA Comments at 2; MFS Communications Comments at ii and 13; Telephone Joint Commenters Comments at 6-7. *See also* Access 2000 Comments at 6-7.

[279]*See Ex Parte* letter from Michael A. Tanner, on behalf of the Telephone Joint Commenters, to Meredith Jones, Chief, Cable Services Bureau, dated May 2, 1996, at

[280]MCI Comments at 4-6

since LECs will have market power in the market for video carriage. Title II-like regulation of carriage rates is necessary.[281]

117. State and local governments and regulators generally oppose limiting the regulation of open video system carriage rates to the complaint process. They suggest methods such as "most favored nations", that would require open video system operators to charge unaffiliated providers the same rates as affiliated providers under similar conditions, or cost-based rates.[282] Cable interests urge the Commission not to rely on market forces and the complaint process to ensure that the open video system carriage rates are just and reasonable.[283] NCTA suggests that since open video system operators will control a "bottleneck facility", they will engage in a "price squeeze", setting carriage rates high enough to exclude unaffiliated programmers while charging consumers competitive prices for delivered programming.[284] The state and local government and the cable interests state that telephone companies will use their considerable resources and the complaint process to block unaffiliated programmers' access to the open video system.

118. Some of the cable and programming interests propose cost-based regulation approaches similar to those recommended by state and local governments.[285] Alternatively, Continental and CATA suggest using the leased access model for setting open video system carriage rates.[286] NCTA suggests that the Commission use a benchmark approach similar to that adopted for cable rates following the 1992 Cable Act.[287] Viacom suggests that the reasonableness of a carriage rate for an unaffiliated programming providers be evaluated on the basis of the carriage rates "imputed" from what an open video system operator charges its affiliated

[281]MCI Comments at 1-2.

[282]*See, e.g.*, National League of Cities, et al. Comments at v-vi, 8, 13, 18, and 27; State of California Comments at 6; State of New York at 4; Texas Cities Comments at 3-5. *See also* National League of Cities, et al. Reply Comments at 20-27. In particular, the National League of Cities, et al. argue that LECs should bear the burden of proof in complaint proceedings in exchange for less stringent regulation of rates (at 20-21); that LECs confuse rate regulation vis-a-vis programmers with rate regulation vis-a-vis subscribers (at 22); and that the LECs are dominant in the market for video transport because unaffiliated video programming providers have no alternatives (at 26-27).

[283]*See, e.g.*, American Cable, et al. Comments at 18-19 and 21; Time Warner Comments at 19-23; Time Warner Reply Comments at 11-12; NCTA Reply Comments at 17-19.

[284]NCTA Comments at 18.

[285]MPAA Comments at 8; HBO Comments at 20; Access 2000 Reply Comments at 5.

[286]Continental Comments at 8; CATA Comments at 2-3. The National League of Cities and MPAA oppose using the leased access model. National League of Cities, et al. Comments at 10-11 and MPAA Reply Comments at 9. The NCTA suggests that if open video system carriage rates are not regulated, then cable leased access rates should be deregulated. NCTA Comments at 20.

[287]NCTA Comments at 18.

programming providers.[288]

119. As the comments reflect, there are a range of methods, varying in complexity, to ensure that a carriage rate is just and reasonable and not unjustly or unreasonably discriminatory. We agree with the Joint Telephone Commenters that regulation of carriage rates is unnecessary to ensure that rates are just and reasonable and that there be no review process prior to the open video system operator implementing its rate structure. A new entrant confronting an incumbent monopolist should not face a regulatory structure that precludes the entrant from responding to circumstances expeditiously. We think it appropriate to review an open video system carriage rate only after a complaint has been filed and that the rate should be presumed just and reasonable when specified conditions are present. We think that this structure will provide flexibility to the open video system operator, an incentive to attract unaffiliated programming providers to the system, and reduce litigation and administrative expenses associated with any rate review process.

120. Cost-based rules are traditional and useful means to determine rates, yet this approach would be significantly burdensome on the Commission and the open video system operator. Cost-based regulation involves tariff, or tariff-like, filings, closely paralleling Title II methods. We do not believe that the cost-based approach is consistent with the structure envisioned by Congress for open video systems. Notably, Section 653(c)(3) prohibits Title II type regulation of open video system rates. Moreover, the process involved in performing such a review is inconsistent with the confined time limits established by Congress for review of certifications and complaints. We disagree with MCI's conclusions and recommendations. MCI's approach would contravene Congress' intent that open video systems not be subject to extensive Title II-like regulation.[289] As to benchmark and leased access approaches, we think that these are suited to the specific statutory schemes to which they apply and that the particular models cannot be transposed to open video systems. The benchmark approach was established by the comparison of competitive and noncompetitive cable systems. No parallel comparison can be made for open video systems, since no markets yet exist. Leased access was designed to offer access to a limited portion of a closed platform, not to provide access to the open platform of an open video system.

121. Two parties suggested specific safe harbor or presumption proposals. The National League of Cities, et al. proposes a safe harbor where carriage rates would be presumed unreasonable unless: (1) at least four unaffiliated video programming providers bought carriage on an open video system; and (2) unaffiliated video programming providers occupied at least one-third of the system's activated channel capacity.[290] By contrast, the Telephone Joint

[288]Viacom Comments at 13.

[289]Conference Report at 178-79.

[290]National League of Cities, et al. Comments at 20. National League of Cities, et al. Reply Comments, Attachment at 11.

Commenters state that if a presumption is adopted, rates should be presumed reasonable if (1) at least one unaffiliated programming provider contracted for carriage at a price no less than the challenged price; and (2) the open video system operator charges unaffiliated programming providers prices that are equivalent to affiliated programming providers for carriage of similar programming under similar circumstances. The Joint Telephone Commenters stated that this proposal would "minimize litigation regarding the reasonableness of prices for open video service carriage".[291]

122. We think that the presumption approach will best ensure the reasonableness of carriage rates while minimizing the number of complaints. We conclude that the conditions that must be present to presume a just and reasonable rate are reflected in the law's prohibition against the open video system operator dominating the system where demand for carriage exceeds channel capacity. Congress limited the open video system operator and its affiliates in this circumstance to one-third of the activated channel capacity to enhance competition and diversity of programming.[292] Implicit in this limit is the assumption that one-third of the channels will enable the operator and its affiliates to offer a viable programming package to subscribers. Accordingly, we believe that where one-third of the system's capacity is leased to one or more unaffiliated programming providers as a group, there is sufficient reason to believe that the rates charged to those providers is reasonable. However, we also need to ensure that the rate offered to the complaining party is reasonable. Accordingly, we believe it is also necessary to compare the average rate paid by unaffiliated programmers on the system to the complained of rate. The average rate may be "weighted" to account for legitimate variances in rates, such as discounts given for volume, contract length, creditworthiness, or the number of subscribers reached. Where one-third of the system's capacity is leased to one or more unaffiliated programming providers as a group, and the complained of rate is no higher than that of the average rate of all unaffiliated programmers, there is sufficient reason to conclude that the open video service system is accessible and the negotiated carriage rates are just and reasonable. Once the open video system operator demonstrates that the presumption conditions are present, the burden shifts to the complainant to demonstrate that the rate is not just and reasonable.

123. We think that these conclusions also apply when one or more unaffiliated programming providers negotiate and as a group obtain capacity equal to that of the open video system operator and its affiliates if the operator or affiliate occupies less than one-third capacity. In this circumstance, there is greater unaffiliated programmer participation than the law requires. The remaining capacity, which exceeds one-third, is occupied by or available to other program providers.

124. We think that unaffiliated programmers providing service on one-third of the open

[291] *See Ex Parte* letter from Michael A. Tanner, on behalf of the Telephone Joint Commenters, to Meredith Jones, Chief, Cable Services Bureau, dated May 2, 1996, at 2

[292] Conference Report at 177

video system, or in an amount equal to the open video system operator if the operator has less than one-third, is sufficient. With at least one unaffiliated provider on the system, having capacity equal to that of the open video system operator or one-third of the capacity, individual programmers have an alternative to the operator as a source of distribution for their programming. We disagree with the National League of Cities et al.'s proposed requirement of at least four unaffiliated programming providers. This requirement would not adequately demonstrate that carriage rates are just and reasonable. We also disagree with the portion of the Telephone Joint Commenters' proposal that would, in effect, conclusively presume carriage rates to be just and reasonable if only one channel were occupied by an unaffiliated programming provider. The presence of one, or even several programmers, on a diminutive portion of the available capacity is not sufficient to show a just and reasonable rate.

125. When the presumption conditions are not present, and an eligible potential programming provider files a complaint with the Commission that a carriage rate is unjust and unreasonable, we agree with Viacom's recommendation that the most effective way to evaluate whether a rate is just and reasonable is to compare it to an imputed carriage rate associated with the open video system operator or its affiliate.[293] We disagree with the Joint Telephone Commenters that no rate formula is possible.[294] The imputed rate approach provides a legitimate basis to fullfill the law's requirement that the rate be just and reasonable.

126. The imputed rate approach is an application of the Efficient Component Pricing Rule to open video systems.[295] This approach is particularly applicable to circumstances where a new market entrant, the open video system operator, will face competition from an established incumbent, the cable operator. A competitive environment facilitates this approach as market forces limit the ability of the open video system operator to increase its imputed carriage rate. The open video system operator must obtain programming and seek subscribers in a competitive environment, thereby providing a sound basis of comparison to determine whether the unaffiliated rate is just and reasonable. The prices that determine the revenues and costs that make up the imputed carriage rate are effectively set in a competitive market. For example, subscriber revenues are determined in part by the prices that subscribers pay for delivered programming. These prices are determined by the competition for subscribers between open video systems, incumbent cable systems, Direct Broadcast Satellite ("DBS") services, and other video programming distributors. Similarly, programming costs are determined in part by the license fees that open video system operators pay to programming networks. These license fees are determined by the competition for programming between open video systems, incumbent cable

[293]Viacom Comments at 13.

[294]See *Ex Parte* letter from Michael A. Tanner, on behalf of the Joint Telephone Commenters, to Meredith Jones, Chief, Cable Services Bureau, dated May 2, 1996 at 1.

[295]William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. Reg. 171 (1994); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 Yale J. Reg. 225 (1994).

systems, DBS services, and other video programming distributors.

127. The imputed rate will reflect what the open video system operator, or its affiliate, "pays" for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

128. Irrespective of whether the presumption conditions are present or whether the imputed rate is reviewed, a complaint may be filed only by a programming provider that has sought carriage on the open video system. If the open video system operator meets the conditions of the presumption, the burden will fall on the complainant to show that rates are not just and reasonable.[296] Upon the filing of a complaint, the open video system operator will have the burden of proof to demonstrate that its carriage rates are just and reasonable, consistent with the precepts set forth above.

2. Open Video System Carriage Rates Must Not be Unjustly or Unreasonably Discriminatory

a. Notice

129. In the *Notice*, we tentatively concluded that some level of differentiation in rates

[296] An open video system operator not meeting the conditions for presumption will not have to justify its rates unless a complaint is filed with the Commission by a programming provider who has sought carriage.

charged to various categories of video programming providers would not be unjust or unreasonable. We sought comment on the criteria on which such differences could be based.[297]

b. Discussion

130. We adopt our tentative conclusion that some level of rate differentiation is permissible, provided that the bases for the differences are not unjust or unreasonable. We therefore agree with those commenters that argue that open video system operators should be given flexibility to offer different carriage rates.[298] For instance, the Telephone Joint Commenters argue that if open video system operators were required to offer carriage at the same per channel rate for all customers, the rate would be too high for programming with a low market value. To prevent this outcome, they argue that open video system operators should be allowed to base rates on legitimate, objective market factors.[299] Such legitimate, objective factors might include: (1) differences in economies of scale or cost savings, such as volume discounts; (2) differences in creditworthiness and financial stability; (3) differences in the number of subscribers reached; and (4) preferential carriage rates for not-for-profit programming providers.[300] Absent such valid reasons, we will prohibit open video system operators from engaging in unreasonable or unjust discrimination against unaffiliated video programming providers.

3. Disclosure of Programming Contracts

a. Notice

131. In the *Notice*, we tentatively concluded that an open video system operator should be required to make its contracts with all video programming providers publicly available. These contracts would disclose the rates charged to programming providers and other terms and conditions of carriage. We proposed this approach in order to give video programming providers a mechanism for determining whether they were being subject to discriminatory rates, terms or conditions of carriage.[301]

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[297] *Notice* at para. 32.

[298] *See, e.g.*, NYNEX Comments at 10-11; U S West Comments at 5-6; Access 2000 Comments at 4-5; Telephone Joint Commenters at iv, 8-10, and 23-24.

[299] Telephone Joint Commenters Reply Comments at 18-19.

[300] We disagree, however, that such preferential rates should be mandatory. *See* Alliance for Community Media, et al. Comments at 20. *See also* USTA Reply Comments at 8 (arguing that preferential rates for non-profits should be voluntary, not mandatory); Continental Comments at 8-9 (arguing that non-profits already have access to carriage through PEG channels, so it is not necessary to mandate preferential rates for non-profits).

[301] *Notice* at para. 34.

b. Discussion

132. After further analysis and careful consideration of the comments, we conclude that it is unnecessary and undesirable to require open video system operators to disclose their carriage contracts. In general, we agree with those telephone companies that argue that making carriage contracts public would stifle competition by forcing them to divulge sensitive information.[302] We believe, however, that it is necessary to give video programming providers some basis for beginning negotiations. We disagree with the conclusion of the National League of Cities, et al. that publicly-posted carriage contracts are the only way to ensure reasonable and non-discriminatory rates.[303] We believe that, in most cases, providing preliminary rate estimates will provide a starting point. In order to protect video programming providers from discriminatory conduct, we will require all open video system operators to make preliminary rate estimates available to potential video programming providers. If, however, a complaint is filed, regardless of which party bears the burden of proof, the open video system operator's contracts with video programming providers will be subject to discovery. Any contracts produced during proceedings may be protected pursuant to the Commission's confidentiality rules.[304]

E. Applicability of Title VI Provisions

1. Public, Educational and Governmental Access Channels

a. Notice

133. Section 653(c)(1)(B) provides that any provision that applies to cable operators

[302] *See, e.g.*, U S West Comments at 7; USTA Comments at 16; NYNEX Comments at 13; NYNEX Reply Comments at n.18; MFS Communications Comments at 13-14; MFS Communications Reply Comments at 5. *See also* Telephone Joint Commenters Comments at 22 (arguing that such a requirement would be tantamount "to a backdoor imposition of Title II-like public tariff requirements on open video system operators") and Reply Comments at 17-18 (arguing that, like cable leased access, contracts should not be made public, but rather subject to discovery in the complaint process)

[303] National League of Cities, et al. Comments at vi; 16-18. The National League of Cities, et al., in their reply comments, argue that in protesting disclosure of contracts, the LECs confuse two different types of contracts: (1) LEC contracts with unaffiliated video programming providers; and (2) LEC contracts with affiliated programmers. It is the latter which the National League of Cities, et al. want disclosed, and claim this disclosure will cause no competitive disadvantage. National League of Cities, et al. Reply Comments at 27-28. We disagree with this assessment. *See also*, Michigan Cities, et al. Reply Comments at 5; NCTA Comments at 19-20; NCTA Reply Comments at 17.

[304] *See infra* Section III.G. *See also* 47 C.F.R. § 76.1003(h). This confidential treatment of programming contracts should deal with the concern expressed by several commenters regarding the public disclosure of programming license agreements. *See, e.g.*, NCTA Comments at n.16; HBO Comments at 22; Viacom Comments at 14.

under Section 611 shall apply to open video system operators certified by the Commission.[305] Section 653(c)(2) provides that in applying these provisions to open video system operators, the Commission "shall, to the extent possible, impose obligations that are no greater or lesser" than the obligations imposed on cable operators.[306] Paragraph (1)(C), however, establishes, among other things, that open video system operators are not generally subject to the franchising requirements of the Communications Act.[307]

134. Generally, Section 611 permits a local cable franchising authority to require that a cable operator designate channel capacity for public, educational, and governmental ("PEG") use.[308] Under this statutory provision, a franchising authority may require, as part of a local cable franchise, or as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for PEG use, and that capacity on institutional networks can be designated for educational or governmental use.[309] The franchising authority is allowed to mandate and enforce franchise requirements for services, facilities, or equipment related to PEG use of channel capacity.[310] The franchising authority must permit the cable operator to use excess channel capacity designated for PEG use when such capacity is not being used for such purposes.[311] Except as provided in Section 611(e), the cable operator is not permitted to exercise any editorial control over PEG channels being operated under the franchising authority's control.[312]

135. In the *Notice*, we sought comment on implementing the 1996 Act's provision applying PEG access obligations to open video system operators, and, in particular, how PEG access obligations should be established in the absence of a franchise requirement.[313] We sought comment on whether an open video system operator should be required to duplicate the PEG access obligations of the incumbent cable operator, either directly, by connecting with the cable operator's PEG channel feeds, or otherwise sharing with the cable operator the capital and operating expenses related to PEG channels, in light of the statute's direction that we should attempt to impose PEG access obligations on open video system operators that are no greater or

[305]Communications Act § 653(c)(1)(B), 47 U.S.C. § 573(c)(1)(B).

[306]Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A).

[307]Communications Act § 653(c)(1)(C), 47 U.S.C. § 573(c)(1)(C).

[308]Communications Act § 611, 47 U.S.C. § 531.

[309]Communications Act § 611(b), 47 U.S.C. § 531(b).

[310]Communications Act § 611(c), 47 U.S.C. § 531(c).

[311]Communications Act § 611(d)(1), 47 U.S.C. § 531(d)(1).

[312]Communications Act § 611(e), 47 U.S.C. § 531(e).

[313]Notice at para. 57.

lesser than those imposed on cable operators. We asked for comment on how PEG access requirements should be established where there is no incumbent cable operator. In addition, we requested comment on whether, if an open video system operator's PEG access obligations must track those of the incumbent cable operator, the open video system operator's obligations would be subject to change if the cable operator and franchising authority negotiate new PEG access obligations pursuant to a cable franchise renewal. We also sought comment on whether and, if so, how the open video system operator should be required to provide the PEG channels to all subscribers of the entire open video system, including those subscribers that do not subscribe to the operator's, or its affiliate's, programming service.[314]

136. With respect to technical considerations, we asked how we should treat an open video system which overlaps several cable franchise jurisdictions, or perhaps covers most of some franchise areas, but only a very small part of others. In addition, we solicited comment on any equipment that is specific to open video systems that local franchising authorities may need to have their programming delivered over open video systems. We also requested comment on how cable operators today comply with different PEG access requirements when a cable system spans more than one franchise area.[315]

b. Discussion

(1) Establishing Open Video System PEG Obligations through Negotiation

137. The first issue we must address with respect to PEG use is how PEG access obligations should be established for open video systems, including the extent and amount of channel capacity and other resources that open video system operators should be required to devote to PEG use. We conclude that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority.[316] These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.[317] We agree that PEG

[314] *Id.*

[315] *Id.* at para. 58.

[316] *See* Alliance for Community Media, et al. Comments at 9; City of Denver Comments at 5; City of Seattle Comments at 1; Texas Cities at 10; Minnesota Cities Comments at 8-9; State of New Jersey Ratepayer Advocate Comments at 4; *see also* NYNEX Comments at 17 (open video system operators should have the flexibility to fulfill their PEG access obligations in all the ways outlined in paragraph 57 of the *Notice*); U S West Comments at 18 (from a technical standpoint, open video system operators should have the same flexibility as cable operators in determining how best to meet PEG requirements). *But see* MFS Communications Comments at 27 (claiming that PEG compliance should be worked out between the programmer and the local franchising authority).

[317] *See* National League of Cities, et al. Comments at 36-37; Cablevision Systems/CCTA Comments at 23; Minnesota Cities Comments at 10; TCI Comments at 18; U S West Comments at 19.

access obligations as a general matter should focus on the needs and interests of the local community.[318] We believe that, as NCTA and others have noted, the local franchising authority is often in the best position to determine the needs and interests of the local community.[319] For instance, in some areas, the local franchising authority may believe that simple connection to the cable operator's PEG feeds adequately satisfies the local community's needs. In other areas, the local authority may prefer that the open video system operator provide separate or different PEG access channels. We believe that the local communities and the public interest will best be served when the parties discuss and reach an agreement regarding all of the PEG issues that pertain to the particular community.[320]

138. We also note that Assn. of Public Television Stations urges that preferential rates for carriage of PEG channels would be in the public interest and would fall under the just and reasonable category of rate discrimination.[321] We are unaware of any cable operator that charges PEG programmers for access to the PEG channels on its cable system. Therefore, because the

[318]Alliance for Community Media, et al. Comments at 33-34 (the public policy behind Section 611 is to guarantee a place on the system for local voices); National League of Cities, et al. Comments at 31. Many commenters support National League of Cities, et al. in their belief that the Commission's rules regarding PEG access and other Title VI requirements must ensure that open video system operators will meet local community needs and interests. *See* National League of Cities, et al. Comments at 31; City of Ann Arbor Reply Comments at 1; City of Boston Reply Comments at 1; City of Charlotte Reply Comments at 1; City of Dayton Reply Comments at 1; City of Encinitas Reply Comments at 1-2; City of Indianapolis Reply Comments at 1-2; City of Kalamazoo Reply Comments at 1-2; City of Lake Forest Reply Comments at 1-2; City of Laurel Reply Comments at 1; City of Portland Reply Comments at 1-2; City of Richardson Reply Comments at 1-2; City of St. Paul Reply Comments at 1-2; City of Santa Ana Reply Comments at 1-2; City of Tucson Reply Comments at 1-2; Oregon Cities Reply Comments at 1-2; Dade County Reply Comments at 1-2; North Dakota Cable Commission Reply Comments at 1; Orange County Reply Comments at 1-2; Pitt County Reply Comments at 1-2; State of Hawaii Reply Comments at 2-3.

[319]*See* NCTA Comments at 33; New York City Comments at 7; New York City Reply Comments at 11; Minnesota Cities Comments at 6; City of Ann Arbor Reply Comments at 2; City of Boston Reply Comments at 2; City of Charlotte Reply Comments at 2; City of Dayton Reply Comments at 2; City of Encinitas Reply Comments at 3; City of Indianapolis Reply Comments at 3; City of Kalamazoo Reply Comments at 2; City of Lake Forest Reply Comments at 2; City of Laurel Reply Comments at 2; City of Portland Reply Comments at 2-3; City of Richardson Reply Comments at 2-3; City of St. Paul Reply Comments at 3; City of Santa Ana Reply Comments at 3; City of Tucson Reply Comments at 2; Oregon Cities Reply Comments at 2; Dade County Reply Comments at 2-3; North Dakota Cable Commission Reply Comments at 2; Orange County Reply Comments at 2; Pitt County Reply Comments at 2-3; Minnesota Cities Reply Comments at 4; State of Hawaii Reply Comments at 3. *See also* National League of Cities, et al. Comments at 29 (citing the legislative history of the 1996 Act (H.R.Rep. No. 104-204, 104th Cong., 1st Sess. at 105 (1996)) as stating that, in considering how to implement PEG requirements for open video systems, the Commission should give substantial weight to the input of local governments).

[320]*See* Alliance for Community Media, et al., Reply Comments at 9 ("A trilateral agreement could produce lower costs for both the cable operator and the open video system operator, and increase the amount of carriage services, facilities and equipment provided to the franchise authorities' cable and OVS subscribers."); National League of Cities, et al. Comments at 35-37. *Cf.* Time Warner Reply Comments at 22 (open video system operators should not be allowed to negotiate lesser PEG burdens than those borne by the incumbent cable operator).

[321]Assn. of Public Television Stations Comments at 13-14.

PEG access obligations of open video system operators are to the extent possible to be no greater or lesser than those imposed on cable operators, we do not foresee open video system operators charging PEG programmers for PEG use.[322] We recognize that certain costs will be associated with providing PEG channels. These costs may be recovered as an element of the carriage rate.

139. Telephone Joint Commenters contend that open video system operators should only be required to provide PEG access that is comparable to that generally in use in the open video system service area without negotiating with local franchising authorities or mirroring requirements imposed on cable operators.[323] Telephone Joint Commenters urge the Commission to adopt a simple rule for PEG access and to rely on the dispute resolution process to ensure compliance with Section 653.[324] Telephone Joint Commenters further assert that open video system operators should not be required to dedicate entire channels to individual PEG entities, and should be allowed to make PEG access available to qualified users on a first-come, first-served basis, by lottery, or any other reasonable mechanism.[325]

140. We disagree. Although some flexibility with respect to PEG access compliance is appropriate, Section 653(c)(2) requires the Commission to impose PEG access obligations that are, to the extent possible, no greater or lesser than the obligations imposed on cable operators.[326] We believe that it is most appropriate to apply Section 653(c)(2) so that an open video system operator's PEG access obligations generally follow those of the particular franchise area where

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[322]See Section III.D.2. above for a discussion of carriage rates that may be charged not-for-profit programmers in a non-PEG context.

[323]Telephone Joint Commenters Comments at 27-28.

[324]*Id.* at 27.

[325]*Id.* at 28.

[326]Communications Act § 653(c)(2), 47 U.S.C. § 573(c)(2); *see also* Letter from The Honorable Daniel Akaka, U.S. Senator, to Judith L. Harris, Director, Office of Legislative Affairs, Federal Communications Commission, (April 4, 1996) at 1 (Commission's rules regarding open video systems should not adversely impact PEG channels); Letter from The Honorable Anna G. Eshoo, Member of Congress, to Reed Hundt, Chairman, Federal Communications Commission, (April 11, 1996) (supporting regulations that provide a level of access for PEG centers equal to that available on cable systems); Letter from The Honorable Neil Abercrombie, Member of Congress, to Reed Hundt, Chairman, Federal Communications Commission, (April 12, 1996) (urging that open video system operators should be required to provide and/or support local PEG access facilities fully and in good faith); Letter from The Honorable Tom Barrett, Member of Congress, to Reed Hundt, Chairman, Federal Communications Commission, (April 1, 1996) (open video system operators should give PEG broadcasters at least the same access, services, facilities and equipment currently available from cable operators); Letter from The Honorable Tom Campbell, Member of Congress, to Reed Hundt, Chairman, Federal Communications Commission, (April 25, 1996) (stating that the open video system regulations regarding PEG access should produce a result that at least equals the level of access, services, facilities, equipment and support available to PEG access centers on cable systems); Letter from Tom Reeser, Executive Director of Oceanside Community Television to Federal Communications Commission, (May 13, 1996) (stating the same); Letter from The Honorable Sam M. Gibbons, Member of Congress, to Lauren Belvin, Office of Legislative Affairs, Federal Communications Commission (April 24, 1996).